IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Himmat Singh vs. The State of Rajasthan.

D.B.Cri. Appeal No.308/2002

Under Section 374 (2) Cr.P.C. against the judgment dated 06.02.02 passed by the Addl. Sessions Judge (Fast Track), Chittorgarh in Sessions Case No.116/2001.

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Date of Order: 26th July, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD
HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI

Mr.Dungar Singh for the appellant.
Mr.JPS.Choudhary, Public Prosecutor.

BY THE COURT :(PER HON.MR.BHAGWATI PRASAD,J.)-

The present appeal has been filed by accused appellant Himmat Singh against the decision of the court of Addl. Sessions Judge, (Fast Track), Chittorgarh in Sessions Case No16/2001 dated 06.02.02 .

A first information report was lodged at Police Station, Gangrar, being FIR N0. 198/2000 under Section 302IPC. The story given in the first information report by informant Bhajja stated that while he, PW/1 Bhajja and PW/2 Kewal Chand were sitting and smoking in the court yard of PW/2 Kewal Chand, they heard noice about a quarrel. When they went outside, they observed in the street -light that near the house of Chhitar Bhil, Pappu Singh @ Hanuwant Singh was lying on the ground and his elder brother Himmat Singh was inflicting knife injuries to him. While they saw the accused doing so they rushed to the spot . Having seen them coming , accused left the injured at that stage. They tried to see the condition of Pappu @ Hanuwant Singh but he did not respond to their call. They witnessed injuries on the chest and abdomen of the injured. They got frightened by the scene . After that few other villagers also arrived. He went to the house of Phool Singh and narrated the incident to him. Phool Singh, telephoned the police. There was a dispute in between the two brothers and that was the reason for the fight.

On the basis of this information, the first information was recorded under Section 302 IPC. After the recording of the information investigation was conducted. Charge sheet was filed in the Magistrate court from where it was committed to the court of

committal and in turn it was made over to the trial court. The trial court framed charges under section 302 IPC against the accused appellant, who denied the charges and claimed trial.

At the trial, 19 witnesses were examined and 38 documents were exhibited. The accused was examined under Section 313 Cr.P.C. 3 defence documents were exhibited, no defence witness was examined.

The trial court , considering the case of the prosecution found that the most material witness PW/1 Bhajja, the first informant and PW/2 Kewal Chand has turned hostile. PW/13 Lakshmi and PW/12 Kundan Singh, a 7 year old child, have deposed against the accused. Further the recovered articles, knife and clothes were found with human blood of the origin group B.

The learned counsel for the appellant , assailing the judgment of the trail court, submitted that PW/1 Bhajja, who is the first informant , has turned hostile. Not only that he has not supported the prosecution case in any aspect , he has not even owned the contents of the first information report. He has stated that he has not given the information . The learned counsel further stated that

PW/2 Kwal Chand has also turned hostile and he has not supported the prosecution case.

According to the prosecution, PW/1 Bhajja had narrated the incident to PW/14 Phool Singh . He has also turned hostile. He has also not supported the version of the prosecution that PW/1 Bhajja informed him of the incident in which it was stated that accused had inflicted injuries. According to the learned counsel, this left the prosecution with two witnesses ,PW/12 Kundan Singh and PW/13 Lakshmi. PW/12 Kundan Singh, according to the learned counsel being son of the deceased ,was interested in deposing in favour of the prosecution. He is a child of 7 years. He was administered oath. The learned trial court perhaps forgot that child witness, in law, are not administered oath.

Apart from the aforesaid illegality, the learned counsel for the appellant has stated that the incident took place on 06. 009.200 at 09.30 PM and the investigating officer reached the scene of occurrence on that day itself. Yet until 09.09.00 this witness was not examined by the police. There is no explanation available as to why until 09.09.00 witness was not examined. Late examination of this witness only suggest that the prosecution was not sure of the

credibility of PW/1 Bhajja and PW/2 Kewal Chand and therefore , witness PW/12 Kundan Singh was planted.

Further, this witness in his cross-examination states that Himmat Singh had called his father and he had followed them. When cross- examined, he has failed to answer as to why the fact that his father was called by Himmat Singh was not mentioned in the police statement. He says that his father sustained two injuries which is not commensurate with the medical evidence. The learned counsel for the appellant has further stated that child witness live in the make believe world and the facts available on record i.e. the date of examination in not informing the police of the fact of calling his father, by his uncle, are the tests which only suggest that this witness was not available when the incident occurred and in that background it was not safe to rely the evidence of this witness for convicting the accused appellant.

The learned counsel for the appellant criticised the testimony of PW/13 Lakshmi by stating that she too was a witness who has been created by the prosecution. She was examined on 09.09.00. No explanation is coming forward in the prosecution case as to why she was examined late. Further , the most important

variance in the statement of PW/12 Kundan Singh and PW/13 Lakshmi is that she does not say that Himmat Singh had called the deceased. She states that while her husband was sitting in the court-yard he got up and went out . There he met Himmat Singh, where Pappu Singh inflicted a single blow of knife . This fact was narrated to her by her son. She is a witness of hearsay. She has no personal knowledge. She states on the basis of the information communicated to her by her son. If the testimony of her son PW/12 Kundan Singh is not worthy of credence then this witness is not a credible witness. If the testimony of PW/12 Kundan Singh and PW/13 Lakshmi is of no consequence, then the evidence of circumstantial nature that the blood was found on knife and clothes which only has the corroborative value , cannot be pressed against the accused. Then the learned counsel for the appellant submitted that the accused appellant is entitled to be acquitted of the charges levelled against him.

Per contra, the learned Public Prosecutor submitted that though PW/1 Bhajja and PW/2 Kewal Chand have turned hostile, but the prosecution case has been narrated in the first information report. PW/12 Kundan Singh and PW/13 Lakshmi , though relatives, have stated that it was the accused who were the assailants. Blood having been found on the knife and clothes, sufficient corroboration is

available on record to sustain the conviction.

We have heard the learned counsel and have given our thoughtful consideration to the facts obtaining on record.

The first and the foremost aspect of the prosecution case is that PW/1 Bhajja and PW/2 Kewal Chand , who are mentioned as eye witnesses in the first information report , have not supported the prosecution case and have turned hostile. Their evidence is worthless. Nothing in their statement is of such nature that the same can lend support to the prosecution. PW/4 Phool Singh , the person who telephones the police after being informed by PW/1 Bhajja of the incident, have also not stated in his statement that PW/1 Bhajja informed him that it was the accused who had assaulted the deceased. Thus, the testimony of these three witnesses do not support the prosecution case.

The trial court in convicting and sentencing the accused have particularly relied on the testimony of PW/12 Kundan Singh and PW/13 Lakshmi. These two witnesses were not examined forthwith.

According to the prosecution, the investigating officer arrived at the scene of occurrence immediately after the incident occurred. There was no reason why these two witnesses, who were members of the family of the deceased, were not examined immediately. The prosecution has tendered no explanation on this count. Since they were examined on 09.09.00, it was the bounden duty of the prosecution to explain as to why the delay occurred in their examination.

In the background that delay has not been explained by the prosecution , if we look to the testimony of PW/12 Kundan Singh and the witness, then the first illegality has been committed by the trial court by administering oath to him. May be that this cannot be a mistake of the child but the trail court was not careful in observing the rules of evidence, where minors are not administered oath. Judged from the background that this witness was examined late, then he prevaricates on a material point, wherein he states in his examination - in- chief that the accused had called the deceased. This point is not mentioned in the police statement. On this aspect, PW/13 Lakshmi also do not support him and she says that the deceased had gone on his own. When the accused had not called the deceased, then following of this witness to his father is a consequence which

is not understandable because a 7 year old child would not follow his father always when he goes out and if this witness had not followed his father he could not have seen the incident. This inference is fortified from the fact that he saw his uncle inflicting knife on his father twice, whereas the number of injuries are more. He again stands contradicted on the point where his mother PW/13 Lakshmi says that her son informed that one injury was inflicted by accused to the deceased. PW/12 Kundan Singh, a child witness who suffers from the infirmities narrated herein above, it is not safe to make his testimony as the basis of conviction.

Then we are left with the testimony of PW/13. She on her own states that she learnt of the accused inflicting injury on her husband from her son. She is a witness of hearsay. When the basic testimony of her son is subject to doubt , it would not be safe to place any reliance on her testimony as far as the actual incident is concerned . This leaves us with no evidence on the point of actual incident. Her testimony, apart from the actual incident, is of the character of motive which suggest that there is some dispute about the land etc. But motive is not clearly stated anywhere in the prosecution case . This leaves us with the circumstance that blood has been found on the knife and clothes. Such recoveries of blood

on the clothes corroborates the feeling, if there was any such evidence. The nature of eye witness have been held by us to be not supporting the prosecution case and in that background the recoveries of blood on the cloth cannot be pressed into service against the accused to sustain the conviction, as ordered by the trial court. Thus, we are of the opinion that there is no sufficient admissible evidence available on record to sustain the conviction and sentence, as awarded against the accused .

In the result , we are persuaded to accept the appeal in the facts and circumstances of the case, there being no legal evidence against the accused. His conviction and sentence are set aside. He is behind the bars, he should be released forthwith, if not required in any other case.

(MUNISHWAR NATH BHANDARI), J. **(BHAGWATI PRASAD), J.**

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